

further said that the money advanced was paid to the defendant through his legal firm and he tendered a copy of the payment voucher (Ex.P3). Accordingly I find that the plaintiff has proved that she had advanced the sum of RM60,000 to the defendant in or around 18 November 1985.

The next question is whether or not the defendant has repaid the sum advanced. The plaintiff testified that she has not received any money from the defendant as repayment for the sum advanced. The plaintiff was also shown a document in relation to the alleged payment of RM45,000 but she denied the signature found therein was hers and said that she has never seen the document before. I have no reason to disbelieve the plaintiff. As such I find that the money advanced by the plaintiff to the defendant pursuant to Ex.P2 is still due and owing.

Conclusion and Orders:

Having considered the evidence given in this case and the exhibits tendered and admitted I am satisfied that the plaintiff has proved her case and is therefore entitled to the relief sought. I therefore hereby grant:

- (i) the order for sale of the Charged Land by way of public auction and subject to ss. 150(1) and (2) and 151 of the Land Code (Cap. 81) to satisfy the sum of RM60,000 being the sum due and owing under the Memorandum of Charged registered as Instrument No. L14010/1985 at the Kuching Land Registry Office on 2 December 1985;
- (ii) that the proceeds of sale shall be deposited with the Court on account of this action until further order;
- (iii) that there shall be interest on the sum outstanding at the rate of 8% per annum from the date of this judgment to the date of full payment;
- (iv) that there shall be costs on party to party basis to the plaintiff; and
- (v) that there shall be liberty to apply.

a LIN LIN SHIPPING SDN. BHD.

v.

GOVINDASAMY MAHALINGAM

HIGH COURT, KUCHING

TUAN RICHARD MALANJUM JC

[CIVIL APPEAL NO. KG. 21 OF 1992 (III)]

5 MAY 1993

b

SHIPPING LAW: Carriage of goods by sea - Goods short landed - Bill of lading - Whether covers deterioration of perishable goods or disappearance - Contra preferentum.

c

INSURANCE LAW: Doctrine of subrogation - Whether insurance company had to plead subrogation - Recovery of damages by insurer.

d

The respondent imported 326 packages and bags of spices products from Singapore amongst which were 100 bags of dates. The respondent utilised the appellants' vessel called "Lin Petaling III" (said vessel) to bring the imported products to Kuching. The terms of the relationship between the respondent and the appellant were contained in the bill of lading issued by the appellant on 18 March 1989. On 28 March 1989 the respondent went to clear the imported products from the Kuching Port Authority and discovered the goods were short landed. The respondent was indemnified by the insurance company for the loss of the goods in the sum of RM1,354. The Insurance Company claimed against the appellant under the doctrine of subrogation.

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Held:

[1] The learned Magistrate believed the evidence of the respondent and the letters from the Kuching Port Authority and found that the appellant failed to prove its defence. As an appellate Court such finding of the learned trial Magistrate should not be substituted without valid reason.

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[2] The tally sheet which would have cleared any doubt as to whether or not the goods were landed by the said vessel, were not tendered as an exhibit by the appellant at the trial. Such a conduct therefore would surely attract the effect of s. 114(g) of the Evidence Act 1950.

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[3] Non-notification or late notification under the law is not fatal. The three days

notification requirement is not a time limitation provision and thus even without such notification so long as loss can be proven, as in this case, the respondent succeeds.

[4] Having considered the finding of the learned trial Magistrate both in fact and in law, the learned Magistrate had not erred in holding that there was no need for the insurance company to plead subrogation.

[5] If a party does not wish to rely on a certain issue as a basis for a claim or as a defence it is not the function of the Court to consider such issues in coming to a decision except in certain cases as for instances where the illegality is *ex facie* or where the evidence adduced at a trial clearly shows illegality.

[6] The conditions in the bill of lading must be interpreted contra preferentum. On reading clause 4(B) in the light of the other clauses of the bill of lading it cannot be said that it covers a total loss of the types of goods mentioned therein. If it had been the intention there is no reason why only the total loss of perishable goods is covered and not other types of goods. At best clause 4(B) only deals with the decay or deterioration of perishable goods and not where there is a total loss or disappearance of the perishable goods as in this case.

[Appeal dismissed with costs].

Cases referred to:

- JB Jeyaratnam v. Law Society of Singapore* [1988] 3 MLJ 425 PC (cit)
Rothmans of Pall Mall (M) Bhd. v. Neo Rim Har & Anor. [1988] 3 MLJ 478 (foll)
Kian Hin Hang (Pte.) Ltd. v. "American Astronaut" Owners & Ors. [1979] 1 MLJ 216 (cit)
Vaynar Suppiah & Sons v. KMA Abdul Rahim & Anor. Owners of "Lexa Maersk" & Ors. v. KMA Abdul Rahim & Anor. [1974] 2 MLJ 183 (cit)
Wilson v. Raffolovic [1881] 7 QBD 553 (cit)
Teo Kim Kien & Ors. v. Lai Sen & Anor. [1980] 2 MLJ 125 FC (foll)
Lord Diplock in Hobbs v. Marlowe [1978] AC 1 (cit)
Gimstern Corporation (M) Sdn. Bhd. & Anor. v. Global Insurance Co. Sdn. Bhd. [1987] 1 MLJ 302 SC (foll)
Tio Chee Hing & Ors. v. Government of Sabah [1981] 1 MLJ 207 (cit)
Lim Kar Bee v. Duoforties Properties (M) Sdn. Bhd. [1992] 2 MLJ 281
Kiaw Aik Hang Co. Ltd. v. Tan Tien Choy [1964] 30 MLJ 99 CA (foll)
Gosse Miller Ltd. v. Canadian Government Merchant Marine Ltd. [1928] All ER 97 (foll)

- a *Steel v. The State Line Steamship Company* [1877] 3 AC 72 (cit)

Legislation referred to:

- Evidence Act 1950, s. 114(g)
 Merchant Shipping (Implementation of Conventions Relating to Goods by Sea and to Liability of Ship Owners and Others, Regulations 1960, Rule 2, Article III, Rule 6, Article III, Rules 2, Article III Merchant Shipping Ordinance 1960, Rule 6, Article III
 Rules of the High Court 1980, O. 18 R. 8
 Subordinate Court Rules 1980, O. 14 R. 14(1)

Other sources referred to:

- Halsburys Laws of England**, 4th Edn., Vol. 16, p. 969
 c **Modern Bills of Lading**, by Paul Todd, 2nd Edn.,
Subrogation in Insurance Law by S.R. Derham
The Law in Singapore on Carriage of Goods by Sea, by Tan Lee Meng, 1986 Edn., p. 232
For the plaintiff - Anthony Bong; M/s. Ibrahim & Co. For the defendant - Margaret Loy; M/s. Matthew T.K. Chan & Co.

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JUDGMENT

Richard Malanjum JC:

This is an appeal by the appellant against the decision of the learned trial Magistrate made in favour of the respondent in an action commenced by the respondent against the appellant in relation to a loss of 53 bags of dates (hereinafter called "the Goods") imported by the respondent from Singapore. The appellant was the carrier of the Goods by its vessel named "Lin Petaling III". At the end of a full trial the learned trial Magistrate only awarded the sum of RM1,354.20 being the special damages claimed by the respondent together with interest at the rate of 8% per annum from the date of judgment to the date of settlement plus both fixed costs and solicitor and client costs. The learned trial Magistrate refused to award general damages and there is no appeal on the issue.

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At the commencement of the hearing of this appeal learned counsel for the appellant applied to amend the Memorandum of Appeal and with the learned counsel for the respondent not objecting I therefore granted the application.

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The amended grounds of appeal of the appellant are therefore as follows:

- (1) That the learned Magistrate erred in fact in holding that the fifty-three (53) bags of dates were missing during the period when the goods were loaded onto the vessel and before they were unloaded from the vessel when in fact it has been proven that the fifty-three (53) bags of dates were in fact missing after they were discharged from the vessel.

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- (2) That the learned Magistrate erred in fact and in law in holding that the defendant is liable to the plaintiff for the loss of fifty-three (53) bags of dates for the period of time after they were loaded onto the vessel and before they were unloaded from the vessel.
- (3) That the learned Magistrate erred in law in holding that there is no need for the Insurance Company to plead subrogation when the legal principles which the learned Magistrate based her decision on for so holding were not referred to in her judgment.
- (4) That the learned Magistrate erred in law in construing that clause 4(B) of the Bill of Lading (Exhibit P1) is only applicable in a situation where goods are found deteriorated and turned bad rather than total disappearance of the goods altogether when in fact on a proper reading of the said clause 4(B) such construction is most unreasonable.
- (5) That the learned Magistrate erred in law in holding that the plaintiff is entitled to the claim of RM1,354.20 on the basis that it is in fact a claim by an insurance company when in fact the statement of claim was pleaded in such a way that it was a claim by the plaintiff on his own behalf.
- (6) That the learned Magistrate erred in law in holding that the plaintiff is entitled to the claim of RM1,354.20 on the basis that it is in fact a claim by an insurance company when in fact the identity of the insurance company has not been sufficiently established as no evidence has been given in Court by the plaintiff.
- (7) That the learned Magistrate erred in law in not holding that there is *prima facie* evidence of delivery of the 100 bags of dates by the defendant to the plaintiff as the defendant has not given notice of the loss of the 53 bags of dates to the defendant within 3 days as required under Rule 6 of Article III of the Merchant Shipping Ordinance 1960.

The facts as found by the learned trial Magistrate are as follows, briefly;

- (a) the respondent imported 326 packages and bags of spices products from Singapore which amongst them were 100 bags of dates;
- (b) the respondent utilised the appellant's vessel called "Lin Petaling III" to bring the imported products to Kuching;
- (c) the terms of the relationship between the respondent and the appellant were contained in the Bill of Lading issued by the appellant on 18 March 1989;
- a (d) on 28 March 1989 the respondent went to clear the imported products from the Kuching Port Authority and discovered the goods were short landed;
- (e) the respondent had since been indemnified by the insurance company for the loss of the goods in the sum of RM1,354; and
- b (f) the claim against the appellant was therefore by the insurance company under the doctrine of subrogation.
- (i) *Ground One:*
- c This ground of appeal is against a finding of fact of the learned trial Magistrate. The thrust of the argument of the learned counsel for the appellant is that Ex.P4 (the Customs Declaration which was declared by the respondent) is inconsistent with Ex.P5 and Ex.P6 which were made some 5 months after the event. Yet, as submitted by the learned counsel for the appellant, the learned trial Magistrate gave undue weight to Ex.P5 and Ex.P6 without considering Ex.P4 which was a contemporaneous documentary evidence. Learned counsel also says that Ex.P4 does not indicate any loss of the goods. So he submits that the goods must have been discharged by the vessel of the appellant.
- d Having read the appeal record including the Judgment of the learned trial Magistrate I do not find any ground to interfere with the finding of fact. The learned trial Magistrate believed the evidence of the respondent and the letters from the Kuching Port Authority which are Ex.P5 and Ex.P6 and found that the appellant failed to prove its defence as contained in paragraphs 4 and 5 of the statement of defence. As an appellate court such finding of the learned trial Magistrate should not be substituted without valid reason: [See: *J.B. Jeyaratnam v. Law Society of Singapore* [1988] 3 MLJ 425 PC].
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- f It is to be noted that for reasons best known to the appellant the tally sheet which would have cleared any doubt as to whether or not the goods were landed by the said vessel, were not tendered as an exhibit by the appellant at the trial although DW1 Lee Kim Jee testified that the appellant's delivery order was in accordance with its tally sheet prepared by a clerk and that both the Kuching Port Authority and the appellant had a tally clerk during the unloading of goods from the vessel. Such a conduct therefore would surely attract the effect of s. 114(g) of the Evidence Act 1950.
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[See: *Rothmans of Pall Mall (M) Bhd. v. Neo Kim Har & Anor.* [1988] 3 MLJ 478; *Kian Hin Hang (Pte) Ltd. v. "American Astronaut" Owners & Ors.* [1979] 1 MLJ 216 and *Vaynar Suppiah & Sons v. K.M.A. Abdul Rahim & Anor.*; *Owners of "Lexa Maersk" & Ors. v. K.M.A. Abdul Rahim & Anor.* [1974] 2 MLJ 183]. I note that a document which appears to be a tally sheet has been incorporated into the appeal record but I find nothing in the notes of proceeding indicating that such a document has been admitted as an exhibit during the trial. Accordingly I do not think I can consider it at all.

Learned counsel for the appellant also submits that the goods were delivered and there was a *prima facie* evidence of their delivery due to the failure of the respondent to give notice in writing within 3 days as required by law. In reply learned counsel for the respondent submits that non-notification or late notification under the law is not fatal. I have considered the arguments and the relevant law and I agree with the learned counsel for the respondent. In any case it is for the respondent in order to succeed in his claim to prove that he has suffered loss or damage. The three days notification requirement is not a time limitation provision and thus even without such notification so long as loss can be proven, as in this case, the respondent succeeds. [See: **The Law in Singapore on Carriage of Goods by Sea by Tan Lee Meng (1986 Edition page 232)**].

Accordingly I find no merit on this ground of appeal.

(ii) *Ground Two:*

In view of my conclusion on ground one above and for the same reason I also find no merit in this ground.

(iii) *Ground Three:*

For this ground it is the contention of the learned counsel for the appellant that the insurance company should have pleaded subrogation and the learned trial Magistrate erred in law in concluding without any basis that it was not necessary. Having read the judgment of the learned trial Magistrate on this issue I do not think she did err as alleged by learned counsel for appellant. In fact the learned trial Magistrate indulged in great length on this issue making references to views

a of learned author S.R. Derham on his book entitled "**Subrogation in Insurance Law**" and the case of *Wilson v. Raffolovich* [1881] 7 QBD 553. I have considered the finding of the learned trial Magistrate both in fact and in law and I do not find them to be in error. In the case of *Teo Kim Kien & Ors. v. Lai Sen & Anor.* [1980] 2 MLJ 125 FC his Lordship Chang Min Tat FJ has this to say on the issue of subrogation at page 126 I (right):

b This case clearly is concerned with the doctrine of subrogation under which an insured must bring an action against the wrong doer if he is called upon by his insurers to do so and is indemnified against the costs, but it is his own cause of action, not that of his insurer that he sues on; as against the wrong doer the insurer has no cause of action of his own: per Lord Diplock in *Hobbs v. Marlowe* [1978] AC 16 at page 37.

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d Similar view was expressed by his Lordship Gunn Chit Tuan J. (as he then was) in the case of *Rothmans of Pall Mall (M) Bhd. v. Neo Kim Har & Anor.* (*supra*) at page 484 I (left) to A - E (right) where he said this:

e After plaintiff's counsel has made his speech in reply, Mr Ponniah sought leave to address the court on two matters. He stated briefly that subrogation had not been pleaded and there was no evidence of it; but when asked by the court, counsel was not able to quote any authority to show that subrogation must be pleaded. Counsel also stated briefly that the Port Swettenham Authority's case [1978] 2 MLJ 137 could not be relied on because the duty of care there was lower than in this case.

f Be that as it may, the doctrine of subrogation has been explained as follows in 16 Halsbury's Laws of England, 4th Ed, at p 969:

g Where one person has a claim against another, in certain circumstances a third person is allowed to have the benefit of the claim and the remedy for enforcing it, even though it has not been assigned to him, and he is then said to be subrogated to the rights of the first person.

h In this case there was no evidence that the benefit of the claim has been assigned so that the insurance company could sue the defendants in its own name: see *The London Assurance Company v. Sainsbury & Anor.* (99 ER 636). But even in the absence of a formal assignment, as there was evidence that the insurance company concerned had paid under the insurance policy it was entitled to the benefit of all rights possessed by the assured,

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i.e. the plaintiff in respect of the loss insured against (*Castellain v. Preston* [1883] 11 QBD 380). It was entitled to enforce the right of action in the plaintiff's name against the defendants who have caused the loss (*King v. Victoria Insurance Co. Ltd.* [1896] AC 250).

I find no reason to disagree with the views expressed by their Lordships and accordingly ground three fails.

(iv) *Ground Four:*

Having perused the statement of defence I am of the view that this ground should not have arisen as this issue was not pleaded as a defence. It only arises due to the ruling of the learned trial Magistrate which, with respect, I do not think to be the correct position of the law. In the case of *Gimstern Corporation (M) Sdn. Bhd. & Anor. v. Global Insurance Co. Sdn. Bhd.* [1987] 1 MLJ 302 SC at page 303 E - F (right) his Lordship Wan Hamzah SCJ said this:

These issues brought up at the trial has not been pleaded in the statement of defence, and this was a contravention of Order 18 Rule 8 of the Rules of the High Court, and therefore the contentions should not have been entertained (*Attorney-General v. Lord Mayor etc. of City of Sheffield* [1912] 106 LT 367).

Order 18 Rule 8 of the Rules of the High Court 1980 is in *pari materia* to Order 14 Rule 14(1) of the Subordinate Courts Rules 1980. If a party does not wish to rely on a certain issue as a basis for a claim or as a defence it is not the function of the court to consider such issue in coming to a decision (see: *Tio Chee Hing & Ors. v. Government of Sabah* [1981] 1 MLJ 207); except in certain cases as for instance where the illegality is *ex facie* where the evidence adduced at a trial clearly shows illegality. [See: *Lim Kar Bee v. Duoforties Properties (M) Sdn. Bhd.* [1992] 2 MLJ 281].

Again in *Kiaw Aik Hang Co. Ltd. v. Tan Tien Choy* [1964] 30 MLJ 99 CA at page 101 B (left) his Lordship Buttrose J. said this:

The case, in my view, must be decided on issues raised by the pleadings which bind the parties. If other issues are desired to be raised or come to light during the trial they must be pleaded by way of amendment.

In the present case even after the ruling of the learned trial Magistrate the appellant made no application to amend its pleading. Thus, for the foregoing reason alone I find this ground fails.

a In the event that I am wrong in my foregoing conclusion, I have also considered the contentions of the learned counsel for the appellant and the respondent. It is not in dispute that the provisions of the Hague Rules are applicable to the Bill of Lading (Ex.P1) in this case by virtue of the Merchant Shipping (Implementation of Conventions Relating to Carriage of Goods by Sea and to Liability of Ship Owners and Others) Regulations 1960 (hereinafter called the 1960 Regulations).

Clause 4 of the Bill of Lading (Ex.P1) issued by the appellant to the respondent provides:

c (A) The carrier shall be under no such responsibility -

(i) at any time prior to the loading of the goods on to and subsequent to the discharge of the goods or part therefore from the vessel when but for the provisions of this clause such goods would be the responsibility of the carrier and

d (ii) in the case of live animals or of cargo which in this Bill of Lading is stated as being carried on deck and is so carried (none of which is subject to the legislation referred to in clause hereof) at any time when, but for the provisions of this clause such goods would be the responsibility of the carrier.

e (B) Fish, fruits, vegetables and all perishable goods to be handled and carried at the sole risk of the shipper. Breakage of glass, china, castings and other goods of a bottle or fragile nature shall be taken to be due to inherent defect, quality or vice of the goods or insufficiency of packing in the absence of evidence of negligence, fault or failure in the duties and obligations of the carrier.

f For the sake of convenience the relevant statutory provisions are reproduced as follows:

g (a) The Schedule of the 1960 Regulations provides:

(i) Article III: Rule 2 reads:

Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

h (ii) Article III: Rule 6 reads:

Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of

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the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be *prima facie* evidence of the delivery by the carriage of the goods as described in the bill of lading.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damages unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

(iii) Article III: Rule 8 reads:

Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.

A benefit of insurance or similar clause shall be deemed to be a clause relieving the carrier from liability.

(a) Article IV: Rule 2 reads:

Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from -

- (a) act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;
- (b) fire, unless caused by the actual fault or privity of the carrier;
- (c) perils, dangers and accidents of the sea or other navigable waters;
- (d) act of God;
- (f) act of public enemies;
- (g) arrest or restraint of princes, rulers or people, or seizure under legal process;
- (h) quarantine restrictions;

- a* (i) act or omission of the shipper or owner of the goods, his agent or representative;
- (j) strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general;
- (k) riots and civil commotions;
- b* (l) saving or attempting to save life or property at sea;
- (m) wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;
- (n) insufficiency of packing;
- c* (o) insufficiency or inadequacy or marks;
- (p) latent defects not discoverable by due diligence;
- (q) any other cause arising without the actual fault or privity of the carrier or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.
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- e* I shall now deal with the construction of clause 4(B) of the Bill of Lading (Ex.P1) in the light of the relevant statutory provisions.
- Learned counsel for the appellant submits that clause 4(B) of Ex.P1 is a blanket clause covering not only the deterioration of perishable goods (in this case the goods) but also their disappearance whilst on board the vessel. If such a construction is given to clause 4(B) then I think it would be inconsistent with Rule 2 of Article III as it would affect the manner of carrying out of the duties agreed by the appellant and consequently null and void and of no effect in view of Rule 8 of Article III. It is to be noted that Article III Rule 8 prevents a carrier from restricting his liability for carrying out an operation which under the contract it has agreed to perform. Once the scope of the contract has been defined by the parties Article III Rule 2 defines the terms of the agreed scope of duties. Thus Article III Rule 8 prevents the carrier from restricting its liability below the requirements of Article III Rule 2. [See: **Modern Bills of Lading** by Paul Todd 2nd Edition]. Further, I do not think Article IV Rule 2 is wide enough to allow such a construction as submitted. Thus, in my view clause 4(B) cannot be taken to be a blanket protection to the
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appellant as a result of the total loss or disappearance of the goods. In fact to give clause 4(B) a meaning so as to exempt the appellant from liability due to deterioration of the goods is being liberal in view of Rule 1(c) of Article III which reads:

The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to -

- (a) ...
- (b) ...
- (c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

[See *Gosse Miller Ltd. v. Canadian Government Merchant Marine, Ltd.* [1928] All ER 97 where it was held by the House of Lords that the burden was upon the ship owners to prove that they were protected from liability by Article IV Rule 2].

A further point that I have considered is that the conditions in Ex.P1 must be interpreted *contra preferentum*. [See: *Steel v. The State Line Steamship Company* [1877] 3 AC 72]. On reading clause 4(B) in the light of the other clauses of Ex.P1 it cannot be said that it covers a total loss of the types of goods mentioned therein. If it had been the intention then I find no reason why only the total loss of perishable good is covered and not other types of goods. After all Ex.P1 is a standard printed document of the appellant. Thus, I can only conclude that at best clause 4(B) only deals with the decay or deterioration of perishable goods and not where there is a total loss or disappearance of the perishable goods as in this case.

Accordingly ground four also fails.

(v) *Grounds Five and Six:*

I deal these two grounds together as they involve a similar issue. In view of my finding on ground three of this appeal ground five has no merit. I do not think that the failure to call any witness from the insurance company can be taken as fatal to the claim of the respondent. As for ground six it is my view that besides my finding on ground three above I only have to quote in agreeing with what his Lordship Chang Min Tat FJ at page 126 I (right) to page 127 A - B (left) has to say in the case of *Teo Kim Kien & Ors. v. Lai Sen & Anor.* (*supra*):

- a If the damages suffered by the insured himself either to his person or to his car had been settled and paid to him by the insurer under the policy of comprehensive insurance, the doctrine of subrogation still applies and the insurer may require the insured to take an action against the wrong doer for the recovery of all the damages flowing from the latter's negligence. The insured's own interest in the action may be limited to the first part of the damage claim which he had to pay under the excess clause or to the excess of his personal injury claims over what he had been paid by the insurer. If the action succeeds and he recovers a sum in settlement of his claims, he is bound to refund to the insurer what his insurer had paid to him under the policy of insurance.
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And in *Rothmans of Pall Mall (M) Bhd. v. Neo Kim Har & Anor.* (*supra*) his Lordship Guan Chit Tuan J. (as he then was) at page 484 E - F said this:

- d The defendants cannot raise as a defence or in mitigation of damages the fact that the plaintiff as the assured has been indemnified by the insurance company (*Mason v. Sainsbury* [99 ER 538] and *Clark v. Blything Inhabitants* [107 ER 378]).

- e As such ground six fails.

(iv) *Conclusion:*

For the foregoing reasons this appeal is dismissed with costs.

- f As for my observation on the conduct of this appeal I can only say that there was hardly any local authority cited by learned counsel to support their arguments. The vision to establish our own Malaysian common law and body of judicial precedents will be very much impaired if such an attitude is epidemic in this country!!!
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